

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Case No. 08-2020-CV-01179

Danielle Mickelson, Lydia Gessele,  
Lonnie Thompson, Summer Joy Pederson,  
and Naina Agarwal,

Plaintiffs,

v.

The North Dakota Department of Health,  
the Health Council of the North Dakota  
Department of Health, and Julie  
Wagendorf in her official capacity as the  
Food and Lodging Director of the North  
Dakota Department of Health,

Defendants.

**ORDER GRANTING PLAINTIFFS'  
MOTION FOR JUDGMENT ON THE  
PLEADINGS AND DENYING  
DEFENDANTS' CROSS-MOTION FOR  
JUDGMENT ON THE PLEADINGS**

**INTRODUCTION**

[¶1] This matter is before the Court on the parties' competing *Motions for Judgment on the Pleadings*. Docket Number 70 (*Plaintiff's Motion for Judgment on the Pleadings*), and Docket Number 99 (*Cross-Motion for Judgment on the Pleadings*). On September 23, 2020, Plaintiffs filed their *Motion for Judgment on the Pleadings* requesting judgment on the pleadings on the grounds that the Department exceeded its authority by adopting rules that ban the sale of some homemade foods that the Legislature allows to be sold under the Cottage Food Act. Docket Number 70 (*Plaintiff's Motion for Judgment on the Pleadings*). In response, Defendants filed a *Cross-Motion for Judgment on the Pleadings*, resisting the Plaintiffs' *Motion* and asserting that judgment should be entered in their favor as the North Dakota Department

of Health (Department) was fulfilling its statutory obligation and authority by enacting the new cottage food rules, and the rules do not conflict with the Cottage Food Act.

*Docket Number 99 (Cross-Motion for Judgment on the Pleadings).*

[¶2] Hearing was held on the parties' respective *Motions for Judgment on the Pleadings* on November 5, 2020, via the Zoom platform pursuant to North Dakota Supreme Court Administrative Rule 52, as supplemented by North Dakota Supreme Court Administrative Orders 26, 27, 28, 29, 30, and 31, due to the ongoing COVID-19 pandemic. Plaintiffs were represented by their counsel, Tatiana Pino, Erica Smith, and David Chapman. Defendants were represented by Solicitor General J.P. Bialke.

### FACTS

[¶3] The background facts underlying this action are primarily undisputed and are detailed at length in the *Amended Complaint*, and in the parties' respective briefing on the prior *Motion to Dismiss*. See *Docket Number 40 (Amended Complaint)*; *Docket Number 45 (Brief in Support of Motion to Dismiss and to Drop Four Plaintiff Parties)*; and *Docket Number 55 (Plaintiffs' Opposition to Defendant's Motion to Dismiss and Request for Oral Argument)*. The facts are also detailed in the parties briefing on the current *Motion for Judgment on the Pleadings* and *Cross-Motion for Judgment on the Pleadings*. See *Docket Number 71 (Memorandum of Law in Support of Plaintiffs' Motion for Judgment on the Pleadings and Request for Oral Argument)*; and *Docket Number 97 (Brief in Support of Cross-Motion for Judgment on the Pleadings)*.

[¶4] The Court will not restate the facts as alleged in the *Amended Complaint* and outlined by the parties, but incorporates those facts by reference into this *Order*.

### LEGAL STANDARD

[¶5] Under Rule 12 of the North Dakota Rules of Civil Procedure, “after the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings.” N.D.R.Civ. P. 12(c). When considering a motion for judgment on the pleadings, a “complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *McCroskey v. Cass County*, 303 N.W.2d 330, 332 (N.D. 1981). “The court’s inquiry is directed to whether or not the allegations constitute a statement of a claim under Rule 8(a), N.D.R.Civ.P.” *Id.*

[¶6] Under North Dakota’s notice pleading requirements, a complaint need only contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” N.D.R.Civ.P. 8(a). The purpose of this requirement is to “place the defendant on notice as to the general nature of a plaintiff’s claim . . . . In determining the sufficiency of a pleading, we will look to the substance of the claim alleged.” *Daley v. American Family Mutual Insurance Co.*, 355 N.W.2d 812, 815 (N.D. 1984) (citations omitted). When considering a motion for judgment on the pleadings, the court must take the allegations of the complaint as true, and construe them in the light most favorable to the plaintiff. *Kouba v. State*, 2004 ND 186, ¶ 5, 687 N.W.2d 466.

### ANALYSIS

[¶7] Plaintiffs argue that they are entitled to judgment on the pleadings because the Department exceeded its authority when it enacted the challenged rules regarding cottage foods. Specifically, Plaintiffs assert the Cottage Food Act allows North Dakotan residents to buy and sell virtually all homemade meals and foods, but the

Department's subsequent rules restrict the sale of a significant amount of cottage foods. Therefore, Plaintiffs argue the Department's rules conflict with the Cottage Food Act, and the Department exceeded its authority when it enacted the rules with greater restrictions.

[¶8] The Department, in its corresponding *Cross-Motion for Judgment on the Pleadings*, contends that the new cottage food rules it adopted in Section 33-33-10-02 of the North Dakota Administrative Code are consistent with the Cottage Food Act, and that the rules are within the authority of the Department to adopt. Specifically, the Department asserts that the statutes relating to the production and sale of cottage foods remains in Title 23 of the North Dakota Century Code, and is, therefore, within the regulatory and enforcement purview of the Department. Because the Legislature's definition of a "cottage food product" in Section 23-09.5-01(2) of the North Dakota Century Code is ambiguous, the Department asserts that pursuant to its rulemaking and other regulatory authority, it acted to clarify the existing ambiguities in the Cottage Food Act.

[¶9] The primary contention between the parties in the current competing *Motions*, therefore, turns on their respective arguments regarding Section 23-09.5-01(2) of the North Dakota Century Code which defines a "cottage food product" as "baked goods, jams, jellies, and other food and drink products produced by a cottage food operator." N.D.C.C. § 23-09.5-01(2). Plaintiffs argue the language "other food and drink" in Section 23-09.5-01(2) means exactly what it says, while the Department asserts that this language is ambiguous, and its rules were necessary to clarify the ambiguity.

[¶10] In *Bindas v. Bindas*, the North Dakota Supreme Court detailed its framework for statutory interpretation as follows:

Statutory interpretation is a question of law, which is fully reviewable on appeal. The primary purpose of statutory interpretation is to determine the intention of the legislation. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. If the language of a statute is clear and unambiguous, the letter of the statute is not to be disregarded under the pretext of pursuing its spirit. If the language of the statute is ambiguous, however, a court may resort to extrinsic aids to interpret the statute.

2019 ND 56, ¶ 10, 923 N.W.2d 803 (citations and quotations omitted).

[¶11] Section 23-09.5-01(2) of the North Dakota Century Code specifically permits the sale of “baked goods, jams, jellies, and other food and drink products produced by a cottage food operator.” N.D.C.C. § 23-09.5-01(2)(emphasis added). The Department maintains “other food and drink” means other food and drinks which are like low-risk baked goods, jams, or jellies. However, the clear language of the statute simply does not support such an interpretation. The statute specifically permits the sale of the listed items (baked goods, jams, jellies) **and** “other food and drink products produced by a cottage food operator.” N.D.C.C. § 23-09.5-01(2). Nowhere in the statute does it say “other similar” food or drink products, or only “low-risk baked goods, jams, or jellies.” Rather, the statute specifically provides: “other food and drink products produced by a cottage food operator.” N.D.C.C. § 23-09.5-01(2)

[¶12] The Cottage Food Act allows North Dakotans to sell “cottage food products” directly to informed consumers. N.D.C.C. § 23-09.5-02. Under the Act, cottage food products are defined as “baked goods, jams, jellies, and other food and drink products produced by a cottage food operator.” N.D.C.C. § 23-09.5-01(2). The Act then defines

a “cottage food operator” as “an individual who produces or packages cottage food products in a kitchen designed and intended for use by the residents of a private home.” N.D.C.C. § 23-09.5-01(1).

[¶13] Under the Act, North Dakotans are permitted to sell baked goods, jams, jellies, “and other food and drink products” produced by cottage food operators. The language could not be any clearer. The term “other food and drink products” means exactly what it says: other food and drink products produced by cottage food operators; not “other similar” products or “other low-risk” products. N.D.C.C. § 23-09.5-01(2). Therefore, this Court concludes nothing about the term “other food and drink products” is ambiguous.

[¶14] Both parties spend a significant portion of their briefs on the present competing *Motions* arguing over the legislative history of Section 23-09.5-01. The language of the statute itself, however, is not ambiguous. “When statutory language is free from ambiguity, it is neither necessary nor appropriate to delve into legislative history to determine legislative intent.” Born v. Mayers, 514 N.W.2d 687, 689 (N.D. 1994)

[¶15] The language of Section 23-09.5-01 itself is not, in any way, ambiguous. Rather the language of the statute permits the sale of “baked goods, jams, jellies, and other food and drink products produced by a cottage food operator.” These words have plain meaning. The Department’s entire argument and interpretation of the Act injects ambiguity where none exists. If the Legislature meant anything different than what is provided in the plain language of the statute, then it is for the Legislature to amend and clarify the statutory provisions. However, term “cottage food product” as currently

defined by Section 23-09.5-01(2) is not ambiguous and the Cottage Food Act plainly allows the sale of a broad array of homemade foods produced by cottage food operators.

[¶16] Interpretation of the Cottage Food Act as allowing the broad sale of homemade foods is also consistent with the Legislature's repeated refusal to enact the Department's requests to restrict cottage food sales. The Department quite relentlessly pursued the challenged rules/restrictions regarding cottage foods for three years. *Docket Number 40 (Amended Complaint)* at ¶¶ 31-36. The Department tried to impose the restrictions in three ways: through HB 1433, through its failed rules in 2018, and through SB 2269. *Id.* Over the course of three years, the Department strongly persisted in its efforts to enact the restrictions on cottage foods, despite opposition. *Id.*

[¶17] The Legislature's refusal to adopt the Department's proposed amendments to H.B. 1433 in 2017 and to pass S.B. 2269 in 2019, both of which would have banned exactly the same homemade foods that the challenged rules now ban, reveal that the Legislature did not intend to so restrict cottage food sales. Therefore, the Department's interpretation of the Cottage Food Act clearly does not effectuate the Act's purpose, and is contrary to the Legislature's stated intent. Adopting the Department's interpretation of the Cottage Food Act would enact restrictions on cottage food sales that the Legislature has already rejected twice. Further, the Department does not cite to any legal authority establishing or even suggesting that if the Legislature fails to pass a law an agency wants, the agency can then enact the law on its own through the back door with rulemaking. Allowing such an end run directly undermines the clear Legislative intent.

[¶18] The Cottage Food Act itself contains certain exclusions to prohibit the sale of cottage foods containing certain meat products. Specifically, it states:

Transactions under [the Act] may not:

...

c. Include the sale of uninspected products made from meat, except as provided under subdivision d; or

d. Include the sale of uninspected products made from poultry, unless:

(1) The cottage food operator slaughters no more than one thousand poultry raised by the cottage food operator during the calendar year;

(2) The cottage food operator does not buy or sell poultry products, except products produced from poultry raised by the cottage food operator; and

(3) The poultry product is not adulterated or misbranded.

N.D.C.C. § 23-09.5-02(3).

[¶19] Nowhere in the Cottage Food Act is the Department of Health granted any authority to further restrict foods that can be sold under the Act. Rather, the Cottage Food Act prohibits the Department from imposing “licensure, permitting, certification, inspection, packaging, or labeling” requirements on cottage food producers. N.D.C.C. § 23-09.5-02(1). The Department can, however, provide “assistance, consultation, or inspection, upon request, of a producer” and investigate complaints of foodborne illness or environmental health problems. N.D.C.C. § 23-09.5-02(1) & (9).

[¶20] The Legislature’s exclusion of only a few specific cottage foods from sale – those being certain meat products – reinforces the Legislature’s intent to allow the broad sale of homemade foods. The North Dakota Supreme Court has “consistently



recognized” that “it must be presumed” that the law is what the Legislature said, not what it did not say. *Est. of Christeson v. Gilstad*, 2013 ND 50, ¶ 12, 829 N.W.2d 453.

[¶21] The Cottage Food Act in this case identifies a limited number of prohibited acts. N.D.C.C. § 23-09.5-02(3). Other than transactions involving the “sale of uninspected products from meat, except [certain poultry products] under subdivision d”, the Cottage Food Act contains no other exclusions on the types of homemade foods that may be sold. *Id.*

[¶22] Because the Cottage Food Act authorizes the sale of homemade foods and expressly prohibits only the sale of homemade foods containing certain uninspected meats, this Court must presume that the Legislature intended to allow the sale of all other homemade foods. N.D.C.C. § 23-09.5-02. The Department’s rules, however, directly conflict with the Cottage Food Act by banning the sale of homemade meals, almost all perishable foods, fresh-cut produce, and low-acid canned foods.

N.D.Admin.Code § 33-33-10-02(1)-(3). Similarly, because the Cottage Food Act prohibits the sale of homemade poultry products not meeting certain requirements, this Court must presume the Legislature intended to allow the sale of all homemade poultry products meeting those requirements. N.D.C.C. § 23-09.5-02. Yet, the Department’s rules prohibit the sale of all poultry except raw poultry. The restrictions imposed by the Department’s rules are in clear and direct conflict with the plain language of the Cottage Food Act.

[¶23] In reviewing the provisions of Section 23-09.5-02, The Court concludes that the Cottage Food Act plainly allows the sale of virtually all homemade foods with only a

few specified exceptions. In contract, the Department's rules prohibit the sale of many more homemade foods than those listed in Section 23-09.5-02, allowing only a few categories of foods to be sold under the Cottage Food Act. The Department's rules essentially turn the Cottage Food Act on its head. Because the Department's rules conflict with the plain text of the Cottage Food Act, the Court concludes that the Department exceeded its authority when it adopted the rules, and that the rules are invalid.

[¶24] “When a statute is clear and unambiguous the letter of the statute cannot be disregarded under the pretext of pursuing its spirit, because the legislative intent is presumed clear from the face of the statute.” See N.D.C.C. 1-02-05; *Born v. Mayers*, 514 N.W.2d 687, 689 (N.D. 1994). If the Legislature intended for the Cottage Food Act to include only a narrow and specific group of homemade cottage foods, it would have stated as much in the Act. The plain language of the Cottage Food Act itself, however, demonstrates a contrary intention. The Cottage Food Act allows for the broad sale of homemade foods, with only limited restrictions. N.D.C.C. § 23-09.5-02.

[¶25] Although the Department claims that it has the general authority to enact rules governing food safety, the agency cannot adopt rules that contradict or conflict with an unambiguous act of the Legislature. The Department's power under the Cottage Food Act is limited to merely “provid[ing] assistance, consultation, or inspection, upon request, of a producer,” and conducting investigations upon complaints. N.D.C.C. § 23-09.5-02(1) & (9). Any general authority the Department has to regulate matters of health and food safety cannot extend to restricting the sale of homemade foods specifically allowed under the Cottage Food Act. Because the Department's rules

banning the sales of certain cottage food products, as set forth in Section 33-33-10-02(1)-(3) of the North Dakota Administrative Code, directly conflict with the Cottage Food Act, the Court concludes that the Department exceeded its rule making authority. Therefore, the rules set forth in Section 33-33-10-02(1)-(3) of the North Dakota Administrative Code which prohibit the sale of homemade foods beyond those specifically identified in Section 23-09.5-02(3) of the North Dakota Century Code are invalid and enjoined from enforcement.

### CONCLUSION

[¶26] Based on the foregoing, the Plaintiffs' *Motion for Judgment on the Pleadings* is hereby GRANTED.

[¶27] The Defendants' *Cross-Motion for Judgment on the Pleadings* is hereby DENIED.

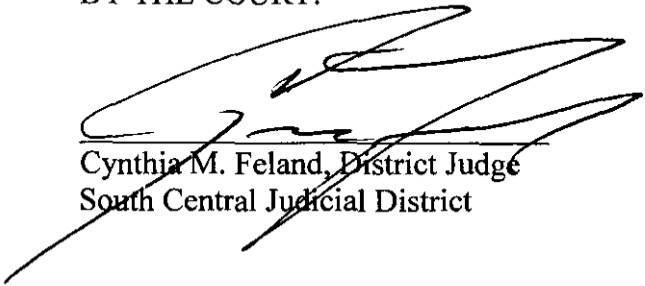
[¶28] Counsel for the Plaintiffs is directed to submit a proposed *Judgment*, and any other necessary concluding documents, consistent with this *Order*.

IT IS SO ORDERED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 10<sup>th</sup> day of December, 2020.

BY THE COURT:



Cynthia M. Feland, District Judge  
South Central Judicial District